IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-728

RONALD A. DIPAOLA,

Petitioner,

v.

James P. Mitchell, Warden
~~WALTER M. RIDDLE, Superintendent,~~
Virginia State Penitentiary,
WILLIAM H. POWELL, Sheriff,
Sussex County, Virginia,
JAMES D. SWINSON, Sheriff,
Fairfax County, Virginia,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. _____

RONALD A. DiPAOLA,

Petitioner,

v.

WALTER M. RIDDLE, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY, WILLIAM J. POWELL, SHERIFF, SUSSEX COUNTY, VIRGINIA, JAMES D. SWINSON, SHERIFF, FAIRFAX COUNTY, VIRGINIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Ronald A. DiPaola respectfully requests that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit has not yet been officially reported. It is annexed to the Petition as Appendix E (10a-16a). The other

relevant decisions in this case also have not yet been officially reported. The initial decision of the District Court granting habeas corpus is annexed to the Petition as Appendix A (1a-3a). The order of the Court of Appeals vacating the District Court judgment and remanding the case is Appendix B (4a). The order of the District Court on remand is Appendix C (5a-6a). The memorandum opinion and order of the District Court denying reconsideration is Appendix D (7a-9a). The order of the Court of Appeals denying rehearing is Appendix F (17a). The order of the State court dismissing the petition for habeas corpus filed in the related case, DiPaola v. Swinson, No. 35143, Circuit Court of Fairfax County, is Appendix G (18a-20a).

JURISDICTION

The court issued its decision on August 21, 1978. It entered an order denying rehearing on October 2, 1978. This Petition is timely filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Stone v. Powell restriction on the exercise of federal habeas corpus jurisdiction requires dismissal of a federal habeas corpus petition when the Fourth Amendment violation on which it is based was not a technical one or due to any good faith mistake, but was the result of willful, bad faith, and flagrantly illegal conduct by the police.

2. Whether petitioner had sufficient opportunity to litigate his Fourth Amendment claim in state court so as to bar relief by federal habeas corpus when, through no fault of his own or his counsel, they did not learn of the facts supporting the claim until

after the trial, too late for the claim to be considered on the merits by any state court because of the state's strict procedural rules.

3. Whether, especially in view of the above considerations, Stone v. Powell may be applied retroactively to bar federal courts from considering a compelling Fourth Amendment claim when no state court has addressed the merits of the claim, when the time for pursuing any additional state procedures has passed, and when, by the standards existing at the time of petitioner's irrevocable procedural decisions, he had complied with the steps necessary to ensure his eligibility for federal habeas corpus review, under the law as it existed at the time those steps were taken.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Statutory and Constitutional provisions relevant to the Petition are United States Constitution Amendment IV; 28 U.S.C. § 2254; Rules 3A:12, 3A:22 of the Supreme Court of Virginia. They are set forth in full in Appendix H-K (21a-28a) to this Petition.

STATEMENT OF THE CASE

On the basis of illegally seized evidence, the Virginia State Court convicted the petitioner, Ronald A. DiPaola, of possession of marijuana with intent to distribute it. The court sentenced him to serve a term of five years in the state penitentiary and to pay a fine of fifteen hundred dollars.

At the time the police made the egregious entry leading to DiPaola's arrest and the seizure of marijuana, DiPaola was in the basement laundry room of a private home, unaware that the police were entering and unable to see or hear their entry through the front

and back doors of the first floor of the house. Not until shortly after his trial did DiPaola and his trial counsel learn for the first time of the flagrantly illegal manner of the police entry.

Dressed in scruffy plain clothing, the police had crashed through the front and back doors, shattering the glass, waving guns, and terrifying several people sitting in the living room. The police had no warrant and had not knocked before they entered, nor had they announced who they were or their purpose. On the contrary, they had maintained for a time that they were not policemen, but were armed robbers. (J.A. 214, 216-218) 1/

As mentioned, because the petitioner was in the basement laundry room, he was unaware of the nature of the police entry. Despite his request for exculpatory materials, the prosecution disclosed nothing about the forcible entry into the house. (Supp. J.A. 8) When he moved to suppress the evidence at trial, the petitioner thus still did not know of the improper entry and naturally could not raise that as one of the grounds for suppression. The state judge declined to suppress on the other Fourth Amendment grounds asserted by the petitioner at that time. A jury convicted DiPaola on June 4, 1974.

Shortly after trial, DiPaola's trial attorney interviewed another client who had been arrested with DiPaola. In this interview, the attorney learned for the first time of the egregious nature of the police entry. (Supp. J.A. 8-9) Because these facts were not in the trial record, the petitioner

1/ The citation refers to the joint appendix filed in the Court of Appeals. "Supp. J.A." refers to the supplemental joint appendix filed in the Court of Appeals.

was unable effectively to raise the point on his direct appeal to the Virginia Supreme Court.

DiPaola petitioned for habeas corpus in the state court, based on the forcible entry claim. Though testimony was taken in this proceeding, the judge refused to consider the merits on the ground that Virginia law barred subsequent review of evidentiary rulings on grounds not raised at trial and on appeal, relying on the contemporaneous objection rule as applied by the Virginia Supreme Court in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975). Appendix G (18a-20a) 2/. See Rule 3A:12(c)(1,2), Rules of the Supreme Court of Virginia; Appendix J (25a-26a).

On December 19, 1975, DiPaola filed a petition for a writ of habeas corpus in Federal District Court. On January 28, 1976, the court, having found that DiPaola had sufficiently exhausted state remedies in view

2/ Slayton v. Parrigan held that where a constitutional claim could have been raised and adjudicated at trial and was not, it could not be the basis of a collateral attack of the conviction absent a showing of ineffective assistance of counsel in failing to raise the question at trial. It provided no other ground for allowing the issue to be raised by collateral attack. In dismissing DiPaola's petition for habeas corpus, the state judge denied him standing to raise the issue on the strength of this case. Appendix G (18a-20a). Notably, when that judge subsequently ruled on a different defendant's motion to suppress based on similar grounds as DiPaola had attempted to raise, he granted the motion. (Commonwealth v. Flick, Cr. No. 23720. Order of Judge Thomas J. Middleton, December 22, 1976).

of the rule in Slayton v. Parrigan, supra, n. 2, considered the merits of DiPaola's Fourth Amendment claim. Aside from the violation of privacy rights, the court found the entry unreasonable because of the unnecessary use of substantial force.

> [T]he manner in which the arrest was effected, namely, through a forced entry (and it was a substantially forced entry; it wasn't just pushing open a closed door; it was a breaking of one door and a breaking of the glass of another, together with the original statement that they were not police officers), warrants the Court... in applying the exclusionary rule. This would hopefully deter this sort of entry, which in my view, constituted an unreasonable search and seizure. (Appendix A, 2a-3a)

Based on the conclusion that the police misconduct was "egregious", the court ruled the search an unreasonable violation of DiPaola's Fourth Amendment rights and granted his petition. Appendix A (3a).

The state prison officials appealed to the United States Court of Appeals for the Fourth Circuit. On the day their opening brief was filed, this Court decided Stone v. Powell, 428 U.S. 465 (1976), restricting the federal habeas corpus relief available to state prisoners asserting Fourth Amendment claims. After the case was fully briefed, the Court of Appeals vacated the District Court's decision and remanded for consideration in light of Stone v. Powell. On remand the District Court held that Stone v. Powell now foreclosed DiPaola's claim. Appendix C (5a-6a).

DiPaola appealed. After the filing of supplemental briefs and oral argument, the

Court of Appeals found that although DiPaola could not be blamed for failing to raise at trial a claim of which he was "excusably ignorant" at that time, he may have been able to raise the claim in state court by a motion for new trial based on newly discovered evidence. Appendix E (14a-15a). The Court held that this mechanism was enough to require application of the Stone v. Powell rule of preclusion, notwithstanding Virginia's rigid contemporaneous objection requirement, and affirmed the denial of habeas corpus relief. Appendix E (14a-15a). The court did not address either in its initial decision or in denying rehearing, the issues raised by DiPaola of whether the rule in Stone v. Powell applied in instances of flagrant police misconduct (Supp. Brief at 15-17), nor whether Stone v. Powell should apply retroactively when the petitioner for good cause was unable to have his claim fully adjudicated at trial and on appeal in state court. (Brief for Appellee at 8-22).

REASONS FOR GRANTING THE WRIT

In 1976, a Federal District Court granted DiPaola's petition for habeas corpus after finding the Fourth Amendment violation by the police so egregious as to require application of the exclusionary rule to deter them from such conduct in the future. Appendix A (2a-3a). On review, the Court of Appeals ruled that the federal court should not even consider this serious constitutional violation. The court based this abrupt withdrawal of a pre-existing federal remedy on the intervening decision of this Court in Stone v. Powell. In fact, Stone v. Powell did not mandate this disposition, but left undecided the important questions this case presents.

The Court should now decide whether Fourth Amendment violations arising from bad

faith, egregious conduct by the police involve a different balance than that struck in Stone v. Powell. Second, the Court in the Stone case withdrew federal habeas corpus relief from state prisoners who had had a "full and fair opportunity" to raise Fourth Amendment claims at trial and on appeal, without providing any guidance to determine what would constitute a "full and fair opportunity". The need for some definition is clear in the face of the growing body of Court of Appeals cases such as this one which have filled the vacuum by depriving the phrase of any meaning and finding opportunity where, by any fair and reasonable standard, there has either been none at all or at best an imaginative and hypertechnical one not yet recognized by any state court.

Finally, the Court should now consider whether there is an exceptional class of cases, in which the state courts have not considered the merits of a substantial Fourth Amendment claim and the absence of a factual record precluded certiorari in this Court, where retroactive application of the rule in Stone violates due process.

I.

THE COURT SHOULD RESOLVE WHETHER STONE V. POWELL BARS FEDERAL HABEAS CORPUS RELIEF FOR FOURTH AMENDMENT CLAIMS BASED ON EGREGIOUS, BAD FAITH CONDUCT BY STATE POLICE OFFICERS.

The Fourth Amendment violation in this case was no mere good faith blunder by a well-intended constable. As the District Court originally found when it considered the merits, the police misconduct was an egregious and wholly unreasonable violation of the Fourth Amendment. Yet in the wake of Stone v. Powell, neither the District Court nor the Court of Appeals would consider

the nature of the violation, but felt bound by that case to dismiss the petition.

The Court should answer the question whether the rule in Stone v. Powell should be extended rigidly to preclude relief in cases of flagrant Fourth Amendment violations. Both that case and its precurser, the concurring opinion in Scheckloth v. Bustamonte, 412 U.S. 218 (1973), recognized a distinction between flagrant Fourth Amendment violations and the "grey twilight area where the law is difficult for the court to apply, let alone for the policeman on the beat to understand."3/ It is in the latter area, and not the former, "where the deterrent function of the exclusionary rule is least efficacious, and where there is the least justification for freeing a duly convicted defendant." Id. This consideration lay at the heart of the balancing test employed in Stone v. Powell, which weighed "the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims." Stone v. Powell, 428 U.S. at 489. The Court in Stone, however, had no occasion to consider the application of that rule to flagrant constitutional violations. In the cases under review there, the violations were the result of the good faith and reasonable, though mistaken, belief by the police that they were proceeding correctly. See id. at 471, 490-91. In that situation, this Court found that exclusion would not serve a deterrent purpose. The opinion did indicate, however, that the courts may still be called on to weight the nature of the police misconduct in the balance. Id. at 482 and n. 17,

3/ Schneckloth v. Bustamonte, 412 U.S. 218, 269-70 (1973) (Powell, Rehnquist, JJ., Burger, C.J., concurring).

485 and n. 23, 490-91 and n. 29. See id. at 499, 501 (Burger, C.J., concurring.) 4/

Before the decision in Stone, the District Court in fact performed such a balancing test and ruled that the police conduct was sufficiently egregious to require that the purpose of the exclusionary rule to deter such misconduct be given controlling weight (Appendix A, 3a). But after Stone, the District Court and the Court of Appeals adopted a per se rule of preclusion that entirely ignored the flagrant nature of the misconduct; instead, the courts declined to exercise habeas corpus jurisdiction on the dubious assumption that the claim, hypothetically, could have been raised by a post-

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4/ The opinion in Stone v. Powell expressed concern about the "disparity" between the nature of the police "error" and the "windfall accorded a guilty defendant." Id. at 490. When, as here, the police conduct was intentional, flagrant, and malicious, the disparity between that misconduct and the defendant's is significantly less than the disparity in the cases before the Court in Stone v. Powell. To apply invariably the balance reached there to cases which do not involve the chief factor in that balance--the negligible deterrent effect of the exclusionary rule on relatively innocent Fourth Amendment breaches--entirely undercuts the force of the rationale employed in Stone. Furthermore, the rule as applied in this case can only encourage the state police and prosecution not to disclose facts that would permit the defendant to raise a Fourth Amendment claim at trial: If the facts do not come out until after trial, the state police can be reasonably certain that their flagrant violation of the Fourth Amendment will be rewarded and never subject to review or redress. See Pulver v. Cunningham, 562 F.2d 198, 200-01 (2nd Cir. 1977).

trial motion for new trial in the state court. Under this extension of Stone, the federal courts are helpless to remedy a flagrant fourth amendment violation if the state court has considered the merits, but arbitrarily denied relief, or, as in this case, if the state court did not consider the merits at all. The values inherent in the fourth amendment are too important to be secured by so delicate a thread.

This case, therefore, presents the opportunity to consider whether the balance struck in Stone v. Powell automatically should apply to close the door to federal habeas corpus relief for intentional and egregious fourth amendment violations.

II.

THE COURT SHOULD PROVIDE EXPLICIT GUIDANCE AS TO THE MEANING OF THE REQUIREMENT OF "FULL AND FAIR OPPORTUNITY" TO LITIGATE FOURTH AMENDMENT CLAIMS IN STATE COURT.

The unreasonably expansive interpretation that the court of appeals lent the phrase "full and fair opportunity" amply attests to the need for a clearer explanation or interpretation of that phrase by this Court.

The rule stated in Stone v. Powell was that a prisoner "who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review" will not ordinarily be entitled to relitigate the claim in a federal habeas corpus proceeding. 428 U.S. at 486 (emphasis added). 5/ In the two

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5/ At the close of the decision, the Court again emphasized that it was holding "only that a federal court need not apply the exclusionary rule on habeas (footnote cont.)

cases under review in Stone v. Powell, the factual records for the fourth amendment claims were complete at the trial level and the legal arguments for the claims had been fully aired by the defense both at trial and on appeal. Language throughout the opinion accordingly indicated that the rule was intended to reach claims that had received actual consideration in the state courts. 6/

5/ (cont.)
review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review." Id. at 494 n. 37 (emphasis added).

6/ E.g., 428 U.S. at 489 (question is whether state prisoner may in federal court again invoke his claim); id. at 491 and n. 31 (costs of exclusionary rule outweigh its benefits when claim has already been rejected by "two or more tiers of state courts" and when prisoner is seeking to have federal court "redetermine" the issue); id. at 512 n. 10 (interpreting majority decision as contemplating that state court "fully and fairly adjudicated the claim") (Brennan, Marshall, JJ. , dissenting). As noted by the concurring judges in Gates v. Henderson, "The federal courts that have been faced with Fourth Amendment habeas claims after Stone have all viewed the question before them as whether, in the individual case, the state courts had in fact meaningfully considered the defendant's claim." 568 F.2d 830, 844 (2d Cir. 1977) (en banc) (Oakes, Smith, Feinberg, concurring), cert. denied, __ U.S. __, 54 L.Ed. 2d 787 (1978).

This case presents a sharp contrast from the cases under review in Stone v. Powell. There was no opportunity here for consideration of the illegal entry claim at trial because the petitioner and his counsel were "excusably ignorant" of the facts giving rise to it. Appendix E (15a). Nor was the claim reached on direct review, because the facts were not in the record on appeal. Appendix G (18a-19a). 7/ The petitioner thus did not have an opportunity fully to litigate the claim "at trial and on direct review." 428 U.S. at 486, 494 n. 37. 8/

The court of appeals erroneously found that the full and fair opportunity test could be met because a motion for new trial conceivably could have been filed. In Virginia, however, neither a motion for new trial nor any other post-trial procedure offered a full opportunity to air DiPaola's fourth amendment suppression claim, notwithstanding the court of appeals' hopeful assurances. Furthermore, even if the objection were not properly raised in the state courts, the full and fair opportunity test would appear to require consideration whether there was good cause for the failure and actual prejudice to the prisoner. See Stone v. Powell, at 478

7/ See, e.g., Holbrook v. Commonwealth, 165 Va. 700, 702, 181, S.E. 353 (1935) (appellate court is limited to consideration of errors apparent on the face of the evidence in the record).

8/ See O'Berry v. Wainwright, 546 F.2d 1204, 1211, 1213 (5th Cir.), cert. denied, 433 U.S. 911 (1977). (Where there are unresolved facts, full and fair opportunity requires consideration by two tiers of state courts, that is, consideration by the fact-finding court and "at least the availability of meaningful appellate review by a higher state court.").

and n. 11. The Court recently has held that claims which the state court has "declined to pass on because not presented in the manner prescribed by its procedural rules" are barred on federal habeas only in the absence of a "showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation." Wainwright v. Sykes, 433 U.S. 72, 82, 84 (1977); Francis v. Henderson, 425 U.S. 536 (1976); Gates v. Henderson, supra, 568 F.2d at 842-43 (Oakes, C.J., Smith, Feinberg concurring). See Rule 12(f), F.R. Crim. P. The petitioner did not raise his claim at trial for good cause--he was understandably unaware of the facts. He suffered actual prejudice "because, undoubtedly, the evidence seized played an important part in the conviction obtained by the State." Appendix A (3a).

Although the petitioner has strenuously sought state court consideration of his claim by filing an habeas corpus petition prior to seeking federal relief, he did not file a motion for new trial. There was good reason for not filing that motion since it is not an appropriate vehicle for presenting a claim that does not go to the merits, that is, to the question of guilt or innocence, but to a collateral issue. See e.g., Lewis v. Commonwealth, 209 Va. 602, 608-09, 166 S.E.2d 248 (1969); Leigh v. Commonwealth, 192 Va. 583, 597, 66 S.E. 586 (1951); United States v. Williams, 415 F.2d 232, 233 (4th Cir. 1969). Supp. Br. for Appellant at 9-10. We have been unable to find any Virginia case where newly discovered facts supporting a claim for exclusion of the evidence based on violation of the fourth amendment, as opposed to a defect in the probative value of the evidence, was entertained by the court on a motion for new trial.

Even if a fourth amendment claim could be raised for the first time in such a motion, it is still open to question whether that constitutes a "full opportunity." Motions for new trial are looked upon with disfavor and granted rarely, United States v. Garner, 529 F.2d 962, 969 (6th Cir.), cert. denied, 429 U.S. 850 (1976). E.g., Murray v. Smithson, 187 Va. 759, 765, 48 S.E.2d 239 (1948). Any appeal of the denial of this motion is subject only to very narrow review. See Holmes v. Commonwealth, 156 Va. 963, 969, 157 S.E. 554 (1931); Cardwell v. Norfolk & W.R. Co., 114 Va. 500, 506-08, 77 S.E. 612 (1913).

Finally, under the contemporaneous objection rule employed by the Virginia Supreme Court, it is apparent that neither this nor any other procedure would have afforded DiPaola a full opportunity to raise his fourth amendment claim. See Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975). DiPaola's Brief at 19-20 n. 11, Supp. Br. at 10,14-15. The force of this rule was demonstrated by the state court's refusal to consider the merits of the claim when DiPaola petitioned for habeas corpus. Appendix G (18a-20a). The court of appeals plainly should not have refused to consider DiPaola's claim under these circumstances:

> If the state provided no corrective procedures at all to redress Fourth Amendment violations, federal habeas corpus remains available. United States ex rel. Petillo v. New Jersey, 418 F. Supp. 686 (D.N.J. 1976) rev'd 562 F.2d 903 (3rd Cir. 1977). It may further be that even where the state provides the process but in fact the defendant is precluded

> from utilizing it by reason of an unconscionable breakdown in that process, the federal intrusion may still be warranted. See Frank v. Mangum, 237 U.S. 309 ...

Gates v. Henderson, supra, 568 F.2d at 840.

The Court should supply a more exacting and meaningful interpretation to the phrase "full and fair opportunity." As this case demonstrates, that qualification in Stone v. Powell rapidly is losing all meaning.

III.

THE RETROACTIVE APPLICATION OF STONE V. POWELL WORKS AN UNNECESSARY AND SERIOUS INJUSTICE ON PETITIONERS WHOSE FOURTH AMENDMENT CLAIMS WERE NEVER HEARD ON THE MERITS IN STATE COURT AND WHO HAD BEEN GRANTED FEDERAL HABEAS CORPUS RELIEF AT THE TIME THAT STONE WAS DECIDED.

In Stone v. Powell, the Court concluded that its newly announced limitation on federal habeas corpus relief could be applied retroactively, because the petitioners there could have had full federal review of their claims by filing petitions for certiorari prior to seeking federal habeas corpus relief. 428 U.S. at 495 n. 38. The fourth amendment violations had been raised at trial and fully adjudicated in the state courts; the Court would have had all the facts before it on certiorari.

That rationale has no force here. Unlike the petitioners in Stone, the petitioner's trial and appeal record here did not contain the facts and arguments supporting his forcible entry claim (Appendix G, 18a-19a), and it could not have been raised for the first time by certiorari.

To apply a literal test of whether there was any opportunity to have a hearing in these circumstances is unwarranted and unjust. When, as here, there was no full hearing, and the question was only one of opportunity, that test should be applied prospectively only.

> [J]udge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of non-retroactivity.

Lemon v. Kurtzman, 411 U.S. 192, 199 (1973). See also, Linkletter v. Walker, 381 U.S. 618, 627-29 (1965); James v. United States, 366 U.S. 213, 221 (1961).

At the time DiPaola determined the procedural course to follow, there logically would have been no reason to move for a new trial. Under the then-existing standards, even his later, unsuccessful efforts to obtain state habeas corpus relief were not required to exhaust state remedies, and he was held to be eligible for federal relief. Appendix A (1a). See generally Fay v. Noia, 372 U.S. 391, 419-420, 438-39 (1963). The court of appeals now has announced that a motion for new trial in state court was an available -- and therefore the only--avenue for relief; but, it could not be followed because the twenty-one day time limit for filing that motion had passed nearly two years earlier.

The Court should consider whether it is not an unnecessary and grave injustice to deny relief to petitioners like DiPaola, whose fourth amendment claims were not litigated in state court and whose irrevocable procedural choices were made, and whose federal habeas corpus petitions were filed, before Stone v. Powell. These people had no reason or opportunity to follow the novel state procedures

that the federal courts have newly discovered in the wake of Stone v. Powell.

CONCLUSION

For the foregoing reasons, petitioner urges that this Court issue a Writ of Certiorari to review the court of appeals decision.

Respectfully submitted,

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October, 1978

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RONALD AUGUSTUS DiPAOLA, Petitioner,	)	
v.	)	CIVIL ACTION NO. 75-858-AM
WALTER RIDDLE, et al., Respondents.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

I am not going to require that the petitioner exhaust further his State remedies, even though technically this issue has never been before the Supreme Court of Virginia. As I read Parrigan, and it's a disturbing decision, because -- well, it's a disturbing decision. I had better leave it at that.

The severity of the punishment for this offense concerns me, but it doesn't, Mr. Zwerling, in my mind, amount to cruel and unusual punishment, and I reject that ground for habeas corpus.

The Commonwealth's right to insist on a jury trial has been upheld, as counsel for petitioner recognized. Those decisions which have upheld it have qualified their opinion by saying that this is not to say that there may not be circumstances under which the actions of the Commonwealth or the Commonwealth's Attorney or the prosecuting attorney are so ignoble, and his motives such, that it would warrant a declaration that such refusal was a denial of constitu-

tional rights to petitioner. However, I don't believe, on this record, I can conclude that the Commonwealth's Attorney's actions are sufficiently ignoble to warrant the granting of habeas relief.

The search and seizure question, however, is another problem. The right guaranteed by the Fourth Amendment of the people to be secure against unreasonable searches and seizures, of course, is grounded in large part on an expectation of privacy. But it's also, it seems to me, directed to the sort of entry here that can be found to be and which the Court concludes, is an unreasonable search.

There was here no evidence that the forced entry was required because of a desire not to reveal the identity of Colavita, although his arrest might warrant the inference that that was a desire.

There was no evidence that the entering officers were concerned about evidence being destroyed. There was no evidence here that the lack of announcement or a forced entry was required because to do otherwise would place the officer in danger, or that he was in danger.

There was no evidence that a forced entry was necessary to keep an arrest from being frustrated. And the manner in which the arrest was effected, namely, through a forced entry (and it was a substantially forced entry; it wasn't just pushing open a closed door; it was a breaking in of one door and a breaking of the glass of another, together with the original statement that they were not police officers), warrants the Court, it seems to me, in applying the exclusionary rule. This would hopefully deter this sort of entry, which in

my view constituted an unreasonable search and seizure.

The causal connection about which the Attorney General's office argues, seems to me, is here; but I'm not sure that a complete causal connection is necessary to bring into play the exclusionary rule for its prophylactic effect.

I find that the manner of entry, egregious as it was, vitiated what would otherwise be a lawful procedure. I, therefore, find that the search was unreasonable and violative of the Fourth Amendment; and the writ will issue, because, undoubtedly, the evidence seized played an important part in the conviction obtained by the State.

The writ will issue, and the defendant will stand, or the petitioner here, will stand released and discharged unless within sixty days the Commonwealth elects to retry him.

The foregoing (being a transcript of the decision as announced from the bench), is adopted as the Court's Findings of Fact and Conclusions of Law.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
January 28, 1976

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1352

RONALD AUGUSTUS DiPAOLA,
Appellee,

v.

WALTER RIDDLE, Superintendent,
Virginia State Penitentiary

JAMES D. SWINSON, Sheriff,
Fairfax County

WILLIAM J. POWELL, Sheriff,
Sussex County,
Appellants.

O R D E R

It appearing that subsequent to the decision of the district court the Supreme Court of the United States decided Stone v. Powell, ___ U.S. ___ (July 6, 1976), which may be dispositive of the instant case; now therefore it is, with the concurrence of Judge Craven and Judge Butzner,

ORDERED that the judgment in the instant case be, and it is, vacated and the case is remanded to the district court for reconsideration in the light of Stone v. Powell.

Harrison L. Winter
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RONALD AUGUSTUS DiPAOLA, Petitioner,	)	
v.	)	CIVIL ACTION
	)	NO. 75-858-AM
WALTER RIDDLE, et al., Respondent.	)	

O R D E R

This case is here on the remand of the United States Court of Appeals for the Fourth Circuit in light of Stone v. Powell, ___ U.S. ___ (July 6, 1976). The decision of this Court on January 28, 1976 was predicated solely on the petitioner's Fourth Amendment claims. This record shows that the State of Virginia, in accordance with Stone, did provide petitioner with an opportunity to fully and fairly litigate his Fourth Amendment claims, even though the arguments in support of those claims before the state court were different from those presented here.

Accordingly, the Court of Appeals having already vacated this Court's January 28, 1976 judgment, it is

ORDERED that the Petition for Writ of Habeas Corpus be denied; the order of this Court letting the petitioner to bail be revoked; and the petitioner surrender himself to the Virginia authorities forthwith for the serving of the sentence imposed by the Circuit Court of Fairfax County, Virginia.

Copies hereof shall be mailed to counsel.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
January 5th, 1977

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RONALD AUGUSTUS DiPAOLA, Petitioner,	)	
v.	)	CIVIL ACTION
WALTER RIDDLE, et al., Respondents.	)	NO. 75-858-AM

MEMORANDUM OPINION AND ORDER

The petitioner has filed a "Motion to Supplement Record and Reconsider Court's Order of 5 January 1977." That order ruled that, in accordance with Stone v. Powell, __ U.S. __, 44 U.S.L.W. 5313 (July 6, 1976), the State of Virginia had provided petitioner with an opportunity to fully and fairly litigate his Fourth Amendment claims.

Whether such an opportunity was provided is the issue raised by the Motion to Reconsider. Petitioner concedes that Fourth Amendment claims were raised by him in the state court proceedings; however he says that his "no knock entry" claim was not raised or considered because neither he nor his counsel was aware of the manner of entry until after his trial was concluded.

In support of the Motion to Reconsider, petitioner seeks to supplement the record with an affidavit from his former retained counsel which states counsel was not aware until after the trial of the manner of entry; that this information was brought to his attention by his client Scheps 1/; that

1/ The record reveals that Scheps was on the same floor as the entry [footnote cont.]

the manner of entry was raised in petitioner's direct appeal to the Virginia Supreme Court following his conviction; and that "Brady" material was requested by counsel prior to trial. The motion to supplement the record will be granted and the Court, as indicated, has considered the affidavit.

The Court also has considered the transcript of the preliminary hearing of March 13, 1974. The only references to the manner of entry contained in that transcript are the officers' testimony as to a "raid" and that they would "hit" the residence. These are not significant, except perhaps when considered with other evidence which might have alerted counsel as to the type of entry effected.

Petitioner attempted to raise the "no knock entry" claim in a state habeas corpus proceeding, but this was rejected on the basis of Slayton v. Parrigan, 215 Va. 27, 205 S.E. 2d 680 (1974).

Based on the following considerations, the Court concludes that petitioner has had the opportunity referred to in Stone to raise his "no knock entry" Fourth Amendment claim:

(1) It is inconceivable that petitioner, even though downstairs from the floor where the entry occurred, was not aware of the manner of entry if, as he asserted and as the

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way at the time of the police entry. He had been charged together with petitioner originally, but the charge against him was "nolle pros'd." at the petitioner's preliminary hearing. It appears from counsel's affidavit that he was charged again and pled guilty.

Court found, the entry was so egregious (breaking in of one door and breaking of glass). The record shows that the house was quiet until the entry.

(2) Even though his other client in the case, Scheps, made counsel aware of the circumstances surrounding the entry shortly after the trial and before sentencing, no motion for a new trial was made either on the ground of after-discovered evidence or on the ground of suppression of evidence favorable to the accused upon request. Brady v. Maryland, 373 U.S. 83, 87 (1963); Stover v. Commonwealth, 211 Va. 789, 180 S.E. 2d 504, 508-509 (1971). A request was made here. The implications of such circumstances were not new even then. Ker v. California, 374 U.S. 23, 37 (1963). Faced with the issue upon a proper record, as it subsequently was in Johnson v. Commonwealth, 213 Va. 102, 189 S.E.2d 678 (1972), the Virginia Supreme Court might well have concluded that there were no "exigencies of the circumstances" warranting the manner of entry present here. Id. at 680.

The Motion to Reconsider the Court's Order of January 5, 1977 is denied; and the latter is ordered into execution forthwith.

/s/ Albert V. Bryan, Jr.
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1293

Ronald Augustus DiPaola,

Appellant,

versus

Walter Riddle, Superintendent,
Virginia State Penitentiary
James D. Swinson, Sheriff,
Fairfax County, William J. Powell,
Sheriff, Sussex County,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued: October 6, 1977

Decided: August 21, 1978

Before HAYNSWORTH, Chief Judge, FIELD, Senior Circuit Judge, and THOMSEN*, Senior District Judge

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* Senior District Judge of the District of Maryland, sitting by designation

John Kenneth Zwerling (J. Flowers Mark on brief) for Appellant; Jerry P. Slonaker, Assistant Attorney General (Anthony F. Troy, Attorney General of Virginia on brief) for Appellees.

HAYNSWORTH, Chief Judge:

Prior to and during the trial in the state court for the possession of marijuana with the intention of distributing it, DiPaola sought the suppression on constitutional grounds of marijuana that had been seized. At that time, however, he did not object to the search on the ground that there had been a "no knock" entry of the house and no announcement that the ununiformed intruders were policemen. DiPaola had been in the basement of the house, and his counsel represented that he knew nothing of the manner in which entry was effected. One of the persons arrested, however, was on the first floor of the house and knew of the "no knock" entry. He was represented by the same lawyers who represented DiPaola, and they reported that they did not learn of the nature of the entry from their other client until shortly after a jury found DiPaola guilty, though this was several months before the court imposed its sentence upon DiPaola. The question is whether DiPaola had an opportunity to fully litigate his "no knock" entry claim in the courts of Virginia so as to foreclose his assertion of that claim in a federal habeas corpus proceeding under the rule of Stone v. Powell, 428 U.S. 476 (1976).

I.

Acting upon an informant's tip, a regular, full time, but undercover, policeman went to a house in Fairfax County, Virginia posing as a prospective purchaser of marijuana. His informant and DiPaola

were in the yard. DiPaola invited him into the house, and the three went down into a basement room where there were two others. They negotiated for the purchase of twenty pounds of marijuana, and the box was given to Colavita, the policeman, for inspection. After the negotiations were complete, on a signal from Colavita, several policemen in civilian clothing and with drawn guns entered the house. The front door was forced open. A glass pane in the kitchen door was broken so that it might be unlocked from the inside. Perhaps jokingly, one of the intruders informed the people on the first floor of the house, "This isn't a bust. This is just a big rip-off."

One of the intruders, immediately after his entry into the house, went down into the basement room. Another soon followed. They identified themselves as policemen, and they arrested DiPaola and his two companions, and at least pretended to arrest Colavita, the policeman who had been invited in as the purchaser of the marijuana. They returned upstairs with the four persons placed under arrest and the marijuana, and then disclosed to the occupants of the first floor their identity as policemen.

Before and during DiPaola's trial, his lawyer sought the suppression of the marijuana, contending that there was no probable cause for a search by the policemen who participated in the forceful entry, and that there was no warrant.

Only one of the persons on the first floor of the house at the time of the forced entry was arrested. That one, Scheps, was represented by the same lawyers who represented DiPaola. Scheps, of course, knew all about the forced entry, but the lawyers later filed affidavits that Scheps did not tell them about the manner

in which the intruding policemen gained their entrance until they were preparing for Scheps' trial, shortly after the jury had found DiPaola guilty. During DiPaola's trial, they say, they were unaware of the factual basis of the claim that is now asserted in DiPaola's behalf by other lawyers.

II.

When this federal habeas claim was first asserted, the district court concluded that the writ should issue. The statute, 18 U.S.C.A § 3109, requiring federal law enforcement officers to knock and to identify themselves, had no application to the conduct of these state policemen, but the district court thought that the breaking of the doors and the absence of any immediate announcement was so egregious that it amounted to a violation of the Fourth Amendment.1/ The Commonwealth appealed, and, thereafter, the Supreme Court announced its decision in Stone v. Powell. We remanded for reconsideration in light of Stone v. Powell. The district court then held that the claim was foreclosed by that opinion of the Supreme Court, and DiPaola then brought the case back to us.

III.

Stone v. Powell's rule of preclusion is not dependent upon a finding that the conten-

1/ See, however, United States v. Bradley, 455 F.2d 1181 (1 Cir.); United States v. Glassel, 488 F.2d 143 (9 Cir.). Since Colavita had been invited into the house, and had obtained possession of the marijuana as its purchaser, those cases suggest that suppression is not required under § 3109 by reason of a subsequent unlawful entry by other policemen.

tion was asserted and fully litigated in the state courts. It is enough that the state provided the mechanism and an opportunity for such full and fair litigation. See, e.g., Doleman v. Muncy, __ F.2d ___ (4th Cir.) (77-2150, filed June 29, 1978). Our task then is to determine whether Virginia law provided DiPaola an opportunity for the litigation of his claim, notwithstanding the lawyer's ignorance of its factual basis before the jury returned its verdict, in light of Virginia's procedural rule, stated in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), that evidentiary rulings are not open to subsequent review in the absence of a contemporaneous objection. We think there was such an opportunity.

DiPaola was tried in June 1974. According to his trial lawyers they did not learn from Scheps of the nature of the entry by the several policemen until later that month or early in July. The judge, however, did not sentence DiPaola until October or November. The record indicates that the trial lawyers did file some post-trial motions, but they did not seek an order to set aside the verdict or to award a new trial upon the ground of after-discovered evidence providing them with a factual basis to strike the fruits of the search from the evidence. Under Virginia rule 3A:22 provision is made for motions for new trials and to set aside a verdict of guilty if made within twenty-one days after the entry of the final order. Under the rule the motion could have been made within twenty-one days after the imposition of sentence in October or November. Had such a motion been made, we can find nothing in Virginia law which would suggest that an evidentiary hearing and a ruling on the constitutional claim would not have been appropriate and required.

Slayton v. Parrigan, on its face, is a perfectly acceptable rule. The trial judge should have the first opportunity to rule upon objections to evidence, and his ruling should be made at the time the evidence is offered or even in advance of trial. Ordinarily, a party should not be permitted to stand silently by and later to contest the admissibility of crucial evidence only after the fact finding has gone against him. But surely Slayton v. Parrigan does not require defense counsel to speak when he is excusably ignorant of the factual basis of objection later asserted. The rule of Slayton v. Parrigan requires a trial lawyer to assert his objections in a time fashion, but considerations of timeliness do not require a recitation of facts which are unknown to lawyer and client and they are not chargeable by law with knowledge of them. 2/ Slayton v. Parrigan is an expression of a not unreasonable procedural rule designed to promote orderliness. It need not be distorted into an engine of injustice, foreclosing claims which, for good reasons, could not have been asserted earlier.

It is possible that DiPaola may have a claim for habeas relief in the state courts on the ground of inadequate representation by his trial lawyers when they failed to file a motion for a new trial or a motion to set aside the verdict. That is only speculative,

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2/ The district judge thought it inconceivable that DiPaola did not know of the "no knock" entry. Though he was in a basement room, he thought that DiPaola and the others with him would have heard of the commotion. There has been no inquiry as to that, however. We do not know what, if anything, the policeman in the basement, Colavita, heard.

however, for the lawyers may have felt it not worth the candle. The subsequent unlawful entry by other policemen would not affect the legality of Colavita's presence. There was no factual basis for a motion to strike his testimony, and they may have reasonably thought that a motion to strike the physical marijuana exhibit, even if successful, would be held not to warrant a new trial. The questions which would arise if such a claim were asserted, however, are not now before us, and what we have said should not be taken as an expression of opinion upon them.

AFFIRMED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1293

Ronald Augustus DiPaola,

Appellant,

versus

Walter Riddle, Superintendent,
Virginia State Penitentiary,
et al.,

Appellees.

O R D E R

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing en banc, and with the concurrence of Judge Field and Judge Thomsen,

IT IS ORDERED that the petition be, and the same is hereby, denied.

FOR THE COURT:

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

September 29, 1978

APPENDIX G

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County — Prince William County
Fairfax City — Falls Church City

Fairfax County Courthouse
Fairfax, Virginia 22030

Sinclair
Jennings
Keith
Plummer
Morris
Thornton, Jr.
Millsap
Cacheris
Middleton
Judges

November 25, 1975

John K. Zwerling, Esq.
108 N. Columbus Street
Alexandria, Virginia 22313

J. Flowers Mark, Esq.
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E. William Fox, Jr., Esq.
Assistant Commonwealth's Attorney
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RE: Ronald Augustus DiPaola v. James D. Swinson, Sheriff, et al., - At Law No. 35143

Gentlemen:

Recently the above-captioned matter was heard by this Court on a Petition for Writ of Habeas Corpus filed by Mr. DiPaola. Arguments on behalf of the Petitioner and the Common-

wealth were made to the Court.

The primary argument presented to support the Petition for the Writ of Habeas Corpus is set forth in Paragraph No. 14-A, of the Petition. This Court has reviewed the "no knock" cases presented in argument by respective counsel and other cases which it deemed relevant.

A search of the transcript has revealed that the "no knock" argument was not raised in defense of the Petitioner either at his trial or on appeal from that conviction.

It appears that neither counsel for the Petitioner nor counsel for the Commonwealth cited to the Court the cases of Slayton v. Parrigan, 215 VA 27, and Superintendent of the Virginia State Farm v. Jackson, 215 VA 251. These cases stand for the proposition that a petitioner lacks standing in habeas corpus proceedings to raise a question concerning admissibility of evidence when he had full opportunity to raise the question in his trial and upon appeal. As stated in Slayton v. Parrigan at page 30:

> The trial and appellate procedures in Virginia are adequate in meeting procedural requirements to adjudicate State and Federal constitutional rights and to supply a suitable record for possible habeas corpus review. A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction.

The grounds stated in Paragraph No. 14-B of the Petition for a Writ of Habeas Corpus were considered by the trial court at the time of trial. It is the opinion of this court that the issue presented by Paragraph

14-B was correctly decided upon the original trial of the case.

Assuming that evidence was admitted in the trial Court which could have been suppressed because it was obtained in violation of the "no knock" rule, it is the belief of this Court that the Petitioner lacks standing to raise that question on habeas corpus at this time. Therefore, the Petition for a Writ of Habeas Corpus is denied.

Very truly yours,

/s/ Thomas J. Middleton

Thomas J. Middleton

TJM:jla

APPENDIX H

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX I

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the

circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

APPENDIX J

Rule 3A:12, Pleadings and Motions Before Trial; Defenses and Objections; Notice of Insanity Defense.

(a) Pleadings and Motions. Pleadings in a criminal proceeding shall be the indictment, information, warrant or summons on which the accused is to be tried, and the plea of not guilty, guilty or nolo contendere. Defenses and objections made before trial that heretofore could have been made by other pleas or by demurrers and motions to quash shall be made only by motion to dismiss or to grant appropriate relief, as provided in these Rules.

(b) Notice of Defense of Insanity or Feeblemindedness. If an accused proposes to introduce psychiatric evidence that he was insane or feebleminded at the time of the alleged commission of the offense charged, he shall, at least 10 days before the day fixed for trial, serve a written notice of his intention to introduce such evidence. If an accused who failed to serve such notice presents psychiatric evidence at his trial as a defense, the Commonwealth shall have the right to a continuance for a reasonable period of time.

(c) The Motion Raising Defenses and Objections.

(1) Defenses and Objections That Must Be Raised Before Trial. -- Defenses and objections based on defects in the institution of the prosecution or in the written charge upon which the accused is to be tried, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion made within the time prescribed by paragraph (d) of this rule. The motion shall include all such defenses and objections then available to the accused. Failure to present any such defense or objection as

herein provided shall constitute a waiver thereof. Lack of jurisdiction or the failure of the written charge upon which the accused is to be tried to state an offense shall be noticed by the court at any time during the pendency of the proceeding.

(2) Defenses and Objections That May Be Raised Before Trial. -- In addition to the defenses and objections specified in subparagraph(c)(1) of this rule, any defense or objection that is capable of determination without the trial of the general issue may be raised by motion before trial. Failure to present any such defense or objection before the jury returns a verdict or the court finds the defendant guilty shall constitute a waiver thereof.

(3) Form of Motion. -- Any motion made before trial shall be in writing if made in a court of record, unless the court for good cause shown permits an oral motion. A motion shall state with particularity the ground or grounds on which it is based.

(4) Hearing on Motion. -- A motion before trial raising defenses or objections shall be determined before the trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be heard and determined by the court, unless a jury trial is required by constitution or statute.

(5) Effect of Determination. -- If a motion is determined adversely to the accused, his plea shall stand or he may plead over or, if the accused has not previously pleaded, he shall be permitted to plead. The motion need not be renewed if the accused properly saves the point for the purpose of appeal when the court first determines the motion.

(d) Time of Filing Notice or Making Motion. A Motion referred to in subparagraph (c)(1) shall be filed or made before a plea is entered and, in a court of record, at least 7 days before the day fixed for trial.

(e) Relief from Waiver. For good cause shown the court may grant relief from any waiver provided for in this rule.

APPENDIX K

Rule 3A:22. Motion to Strike or to Set Aside Verdict; Judgment of Acquittal or New Trial.

(a) Motion to Strike Evidence. After the Commonwealth has rested its case or at the conclusion of all the evidence, the court on motion of the accused may strike the Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction. If the court overrules a motion to strike the evidence and there is a hung jury, the accused may renew the motion within the time specified in Rule 1:11 and the court may take the action authorized by that rule.

(b) Motion to Set Aside Verdict. If the jury returns a verdict of guilty, the court may, on motion of the accused made not later than 21 days after entry of a final order, set aside the verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction.

(c) Judgment of Acquittal or New Trial. The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason.